86-644

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD SELTZER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STANLEY S. ARKIN
MARC BOGATIN
STANLEY S. ARKIN, P.C.
Attorneys for Petitioner
600 Third Avenue
New York, New York 10016
(212) 869-1450

46pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the use, both at trial and before the indicting grand jury, of defendant's 1981 immunized testimony, to convict for an alleged 1983 perjury, violate the Fifth Amendment and the immunity statute (18 U.S.C. § 6002)?

2. Was defendant's constitutional right to a trial by jury violated when the trial court removed materiality – an essential element of the offense of perjury – from the jury's consideration, and instructed them that this element had been established as a matter of law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD SELTZER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit concerning which this Court's review is sought is reported at *United States v. Seltzer*, 794 F.2d 1114 (6th Cir. 1986), and is reproduced in the Appendix hereto at pp. A1-16.

The trial court's opinion, denying petitioner's pre-trial motions, is reported at *United States v. Seltzer*, 621 F. Supp. 714 (N.D. Ohio 1985), and is reproduced in the Appendix hereto at pp. A17-23.

JURISDICTIONAL STATEMENT

Petitioner requests this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit filed July 7, 1986 affirming Petitioner's conviction for perjury (18 U.S.C. § 1623). Petitioner's petition for rehearing en banc was denied by an order entered August 22, 1986. This Petition for Certiorari is being filed within sixty days of the date of the denial of rehearing as is required by Rules 20.1 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 United States Code § 6002 provides:

Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to –

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for a perjury, giving a false statement, or otherwise failing to comply with the order.

Title 18 United States Code § 1623(a) provides:

False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On May 21, 1981, Edward Seltzer appeared before a federal grand jury conducting a criminal tax investigation focusing upon Seltzer's former employer, Reuben Sturman, and various Sturman controlled companies.

Under protection of the immunity order, Seltzer was interrogated extensively with respect to his role in International Book Sales (IBS), a company of which Seltzer was president from 1975 through 1980. The government contended that IBS was secretly owned by Sturman, and was used by Sturman as a front for his alleged scheme of tax evasion and international money laundering. Much of the government's examination of Seltzer focused on the role that Seltzer played in arranging the transfer of monies from Switzerland to IBS through a Swiss attorney introduced to Seltzer by Sturman. (R112, R119-22, R147-56)[1] The government argued at the trial below that this testimony established Seltzer's complicity in Sturman's alleged illegal conduct. (R67-68, R70-74, R434-36)

Two years later Seltzer was again summoned to the grand jury. On April 2, 1983 he testified before a second grand jury, under a separate order of immunity, issued by a different judge.[2]

As a result of his 1983 appearance Seltzer was indicted, and ultimately convicted, of four counts of perjury (18 U.S.C. § 1623). The indictment alleged that Seltzer's 1983 testimony that he had no present recollection of having signed three 1976 wire transfers was false.

---

[1] The Joint Appendix filed in the Court below is cited herein as "R____".

[2] The trial court found that Seltzer's two grand jury appearances constituted two separate proceedings, pursuant to two separate immunity grants. (A17)

This finding was based on the fact that the grand jury panel before which Seltzer testified in 1983 (Panel No. 83-2-G), was different from the panel before which he appeared in 1981 (Panel No. 79-5-G) (R41), and since he testified pursuant to two separate orders.

Defendant moved pre-trial to dismiss the indictment on the grounds that the use by the indicting grand jury of defendant's immunized 1981 testimony to indict for an alleged 1983 perjury violated the Fifth Amendment and the immunity statute. (18 U.S.C. § 6002) This motion was denied. The trial court also allowed, over defendant's objection, the prosecution to introduce at trial defendant's 1981 immunized testimony. (R23-31) The prosecution used Seltzer's immunized testimony to argue to the jury that Seltzer was a knowing participant in the alleged Sturman tax evasion and money laundering scheme.

Over petitioner's objection (R424) the trial court instructed the jury that materiality had been determined by the Court as a matter of law, and was not for the jury's consideration. (R486-87)

Following conviction, Seltzer was sentenced to an aggregate sentence of imprisonment of eighteen months. Seltzer was granted bail pending appeal.

On July 7, 1986, Seltzer's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit. On August 22, 1986 Seltzer's petition for rehearing en banc was denied. Seltzer was granted a stay of the mandate on September 19, 1986.

REASONS FOR GRANTING THE WRIT

1. THE SIXTH CIRCUIT'S OPINION, PERMITTING USE, IN A PROSECUTION FOR A 1983 OFFENSE, OF 1981 IMMUNIZED TESTIMONY CONCERNING PAST MONEY LAUNDERING AND TAX EVASION, CONFLICTS WITH DECISIONS OF THIS COURT AND THE SECOND CIRCUIT.

The Sixth Circuit affirmed petitioner's conviction, holding that neither the Fifth Amendment nor the immunity statute (18 U.S.C. § 6002) was violated by the use, both before the indicting grand jury, and at trial, of petitioner's 1981 immunized

testimony to convict for a 1983 offense. The Sixth Circuit held that because the charged conduct post-dated the immunized testimony, the government was free to make any use of the immunized testimony it saw fit. The Court below concluded that Seltzer's immunized testimony was bereft of constitutional protection. It is submitted that this holding is in conflict with decisions of this Court (Supreme Court Rule 17.1(c)) and the Second Circuit (Supreme Court Rule 17.1(a)).

The Sixth Circuit's ruling below, allowing use of immunized testimony to establish an alleged subsequent perjury, is flatly inconsistent with a long line of precedent in the Second Circuit, holding exactly the opposite. *See, e.g., United States v. Berardelli*, 565 F.2d 24, 28-29 (2d Cir. 1977); *United States v. Moss*, 562 F.2d 155, 165 (2d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *United States v. Housand, 550 F.2d 818, 822-23 (2d Cir.), cert. denied*, 431 U.S. 970 (1977). Thus, *Berardelli* held: "A witness' truthful testimony, given under a grant of immunity, may not be used to prove... a later perjury." 565 F.2d at 28. Similarly, *Housand* held that prior immunized testimony "may not be used against the witness who, on the second occasion, lies under oath." 550 F.2d at 823. It is submitted that certiorari should be granted so as to resolve this split in the circuits on this important question of constitutional law.

The ruling below, moreover, is inconsistent with applicable decisions of this Court. Thus, in *New Jersey v. Portash*, 440 U.S. 450, 459 (1979), this Court held that "[t]estimony given in response to a grant of... immunity is the essence of coerced testimony," and, accordingly, "may not be put to any testimonial use whatever against [defendant] in a criminal trial."

Specifically, *Portash* held that a defendant's immunized grand jury testimony is inadmissible at defendant's subsequent criminal trial for impeachment purposes, even when there are material inconsistencies between defendant's prior grand jury testimony and his trial testimony. Thus, the Supreme Court has squarely held that the mere fact that a defendant testifies inconsistently with prior sworn testimony – thus committing perjury at his

trial – will not serve to render previously immunized testimony admissible at trial. The holding below that indictment for a subsequent perjury will render admissible previously immunized testimony is thus flatly inconsistent with *Portash*.[3]

The Sixth Circuit's holding, drawing a rigid distinction between past and future offenses, moreover, is inconsistent with *Marchetti v. United States*, 390 U.S. 39 (1968), which soundly rejected any such blanket distinction between past and future acts in terms of Fifth Amendment analysis. This Court expressly refused to adopt "the premise that the privilege is entirely inapplicable to prospective acts." 390 U.S. at 53.[4]

The Sixth Circuit's deviation from Supreme Court precedent is most bluntly illustrated by *Cameron v. United States*, 231 U.S. 710 (1914), a case with facts remarkably similar to this case, and in which this Court held that prior immunized testimony may not be used to prove a subsequent perjury. The *Cameron* defendant had been convicted of two counts of perjury, arising from testimony given by defendant in two separate proceedings, relating to a single bankruptcy case. Cameron's testimony on both

---

[3] It should be noted that the *Portash* Court stated:

> "We express no view as to whether possibly truthful immunized testimony may be used in a subsequent false declarations prosecution premised on an inconsistency between that testimony and later, nonimmunized, testimony. That question will be presented in *Dunn v. United States*, 439 U.S. 1045, 703 (1978)."

440 U.S. 459, n.9. *Dunn v. United States*, 442 U.S. 100, 113 n.14 (1979), however, was decided on another ground, and this precise question was not addressed. To the extent that *Portash* and *Dunn* could thus be said to have left open the precise question involved herein, it is submitted certiorari should be granted pursuant to Supreme Court Rule 17.1(c).

[4] The *Marchetti* rejection of the "rigid chronological distinction" between past and prospective acts for Fifth Amendment purposes was recently re-affirmed in *United States v. Apfelbaum*, 445 U.S. 115, 129 (1980).

occasions had been given pursuant to a statute conferring use immunity. The two counts relating to the two separate alleged perjuries were consolidated for a joint trial. The Court held that admission of the immunized testimony from the prior bankruptcy proceeding, to prove a claimed perjury at a subsequent bankruptcy proceeding, violated defendant's immunity grant, mandating reversal of the conviction.

In addition to failing to follow applicable precedent of this Court, the Sixth Circuit, it is submitted, also misapplied and misapprehended the test for ascertaining whether testimony is potentially incriminatory, and thus subject to Fifth Amendment protection. The Sixth Circuit set forth the test for application of the Fifth Amendment privilege: "[W]hether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." (citing *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980)). (A10)

In answering this question, the Court, however, analyzed the issue from the perspective of whether, when Seltzer testified in 1981, there was a substantial and real risk that his testimony would be used against him in a prosecution for an offense *yet to be committed*, i.e., a 1983 perjury. Utilizing this analysis, the Circuit easily concluded that the 1981 testimony was not constitutionally protected, as any risk that the testimony would be utilized in a prosecution for a future crime could, in 1981, only be deemed "speculative." Such analysis, it is submitted, misconstrues the nature of the constitutional privilege, and serves to render meaningless the protections afforded by the Fifth Amendment and immunity statute in all cases where the government charges an immunized witness with a subsequent offense, and uses his immunized testimony to indict and try him.

Rather than engage in speculation as to whether or not testimony could be utilized in some hypothetical future prosecution — a self-fulfilling and somewhat circular endeavor, destined to always result in a finding of no substantial risk of incrimination, and thus no constitutional protection — it is submitted that the correct approach is to analyze the incriminatory nature of

the compelled testimony as of the date it is forced from the defendant's lips and to ascertain whether, as of that point in time, the testimony could have "furnished a link in the chain of evidence needed to prosecute" a crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Utilizing this constitutionally mandated mode of analysis, it is clear that Seltzer's 1981 testimony, as of the time it was compelled, posed a real and substantial risk of incrimination, and was thus entitled to constitutional protection.[5] Seltzer's compelled 1981 testimony concerning his prior participation in Swiss wire transfers traceable to Sturman and his Swiss attorney were clearly incriminatory, given the context of a criminal investigation into alleged Sturman tax violations and money laundering. As Seltzer's compelled admissions constituted a link in the chain of evidence needed to prosecute Seltzer for aiding and abetting Sturman's past criminal income tax violations,[6] such testimony would have been, and clearly was, incriminatory. The incriminatory nature of the testimony is evidenced by the fact that the government argued at trial that this very testimony established Seltzer's complicity in Sturman's alleged tax evasion. (R67-68, R70-74, R434-36)

The question of the proper scope of the test for determining whether testimony is potentially incriminatory, and thus subject to constitutional protection, is important to the proper administration of criminal justice. As the Sixth Circuit misapplied this standard — adopting the unprecedented approach of determining whether the testimony is incriminating as to an alleged subsequent offense, and disregarding the clearly incriminatory

---

[5] Under compulsion of the immunity grant, Seltzer had testified extensively during his 1981 appearance concerning his role in arranging international wire transfers from a Swiss attorney, introduced to him by Sturman, to accounts in New York. (R112, R119-22, R151-56) In addition, Seltzer was also examined inside the 1981 grand jury about two corporate tax returns he had signed, which he acknowledged to contain factual misstatements. (R188-99)

[6] *E.g.*, 26 U.S.C. § 7206(2) (aiding and assisting in preparation and presentation of false tax return); 18 U.S.C. § 371 (conspiracy to defraud United States).

nature of the testimony with regard to past conduct — it is submitted that this Court should grant review by certiorari.

It should be noted that the Sixth Circuit based its decision herein on its reading of *United States v. Apfelbaum*, 445 U.S. 115 (1980), which it believed to be controlling. *Apfelbaum*, however, did not address the issue raised by this case, *i.e.*, the propriety of the use of immunized testimony to establish a subsequent perjury. The sole issue addressed by *Apfelbaum* was the admissibility of immunized testimony in a prosecution for perjury allegedly committed *during the course of that immunized testimony*. *Apfelbaum* did *not* address the issue of use of immunized testimony in a prosecution for subsequent perjury. Indeed, three members of the *Apfelbaum* majority, Justices Brennan, Blackmun and Marshall, emphasized that the permissible use of immunized testimony at a prosecution for subsequent perjury was *not* an issue involved in or addressed by *Apfelbaum*. 445 U.S. at 132-35 (concurring opinions). The three justices stated that any implication to the contrary that could be read into the Court's opinion would be dicta.

It is respectfully submitted that certiorari should be granted herein to: (1) resolve the split between the Second and Sixth Circuits with regard to the constitutionality of using immunized testimony to prosecute a subsequent offense; (2) to clarify the proper scope of this Court's holding in *Apfelbaum*, particularly in light of *Portash*, and (3) to set aside the Sixth Circuit's opinion herein, which is in clear conflict with this Court's rulings in *Portash*, *Cameron* and *Marchetti*.

2. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN DETERMINE WHETHER *SINCLAIR V. UNITED STATES*, 279 U.S. 263 (1929), PROVIDING THAT MATERIALITY, THOUGH AN ELEMENT OF THE OFFENSE OF PERJURY, IS TO BE DECIDED BY THE COURT, NOT THE JURY, IS STILL VALID IN LIGHT OF *IN RE WINSHIP*, 397 U.S. 358 (1970), WHICH HOLDS THAT THE GOVERNMENT MUST PROVE EACH ELEMENT OF AN OFFENSE BEYOND A REASONABLE DOUBT.

The Sixth Circuit, solely on the authority of *Sinclair v. United States*, 279 U.S. 263 (1929), affirmed the trial Court's removal, over objection, of materiality – an essential element of the offense of perjury[7] (18 U.S.C. § 1623) – from the jury, and direction to the jury that materiality had been established by the Court as a matter of law. It is submitted that dicta in *Sinclair* sanctioning the removal of the element of materiality from the jury is inconsistent with more recent pronouncements of this Court, holding that as a matter of constitutional due process the prosecution has the burden of establishing each element of the offense beyond a reasonable doubt and that an accused is entitled to a jury determination with respect to each element of the offense. This Court should grant certiorari to finally overrule *Sinclair* and, in the process, make clear that the offense of perjury is no exception to the rule of *In Re Winship*, 397 U.S. 358 (1970) and its progeny.[8]

In *Sinclair*, an appeal from a contempt conviction, the Court stated "upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law...

---

[7] *United States v. Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980).

[8] *Francis v. Franklin*, ____U.S.____, 105 S.Ct. 1965, 1968 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

and the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." 279 U.S. at 298.

It is submitted that this dicta simply cannot be reconciled with *Winship*, and should be expressly repudiated by this Court.

The Supreme Judicial Court of Massachusetts was recently presented with a similar request to reevaluate *Sinclair* and asked to hold that materiality must be determined by the jury in perjury prosecutions. In *Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979), the Massachusetts Court stated that the rule permitting withdrawal of materiality from the trier of fact is "predicated on ancient authority which must be reexamined in light of recent constitutional doctrine," 398 N.E.2d at 467. After conducting a thorough review of the genesis and rationale for the materiality rule and its articulation in *Sinclair*, the *McDuffee* Court concluded that the *Sinclair* dicta "has been eroded seriously by modern decisional authority." 398 N.E.2d at 468. Consequently, that Court, in light of the more recent holdings of *Winship* and *Mullaney*, held that

> "the long-standing rule that materiality is a question of law for the court to decide is an impermissible distortion of the principle that the prosecution is required as a matter of constitutional due process to prove beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

398 N.E.2d at 466.

Significantly, the *McDuffee* Court specifically based its holding that materiality must be submitted to the jury on federal constitutional law. 398 N.E.2d at 469. Accordingly, the opinion of the Sixth Circuit herein with respect to this important federal question is in conflict with that of a state court of last resort. (Supreme Court Rule 17.1(a)).

It is submitted that the dissenting opinion of Judge Hendley, of the New Mexico Court of Appeals, from *State v. Gallegos*, 98 N.M. 31, 644 P.2d 545 (N.M. App. 1982), succinctly sets forth the necessity for finally abandoning the *Sinclair* dicta:

> "Perhaps the rule adopted by the majority was not quite so offensive in the days before jury trials were demandable as of right on a great number of issues or before due process of law required proof beyond a reasonable doubt on each essential element of the crime charged. But now, I am most persuaded by the reasoning of *Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979), which is to the effect that recent expansion of constitutional rights requires a jury determination of the element of materiality in perjury.
>
> "In my view, the only reasons to make materiality a matter of law are for ease in administration and because we think that somehow the jury will have difficulty grappling with such a complex concept. I see this reasoning as beginning a dangerous trend, which, if carried to its logical conclusion, will only have the jury instructed on one element for every crime: he [or she] did it. If the Legislature had wanted false swearing under oath to be punishable as perjury, it would not have burdened the statute with the additional requirement of materiality."

644 P.2d at 547-48[9] (brackets in original).

It is respectfully submitted that certiorari should be granted so that the rule, traceable to the *Sinclair* dicta, that materiality, though an element of the offense of perjury, may be removed from the jury's consideration, may be reevaluated in light of recent Supreme Court jurisprudence concerning the proper allocation of the burden of proof in a criminal trial.

---

[9] *Accord, State v. Sands*, 123 N.H. 570, 467 A.2d 202, 232-33 (1983) (dissenting opinion); Lillich, "The Element of Materiality in the Federal Crime of Perjury," 35 Indiana Law Journal 1, 13-14 (1959).

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

DATED: New York, New York
October 16, 1986

Respectfully submitted,

STANLEY S. ARKIN, p.c.

By /s/ Stanley S. Arkin
Attorneys for Petitioner
600 Third Avenue
New York, New York 10016
(212) 869-1450

Of Counsel:
Stanley S. Arkin
Marc Bogatin

APPENDIX

No. 85-3449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD SELTZER,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Ohio Eastern Division

Decided and filed July 7, 1986

Before: KEITH and MARTIN, Circuit Judges; and WEICK; Senior Circuit Judge.

WEICK, Senior Circuit Judge. Defendant-Appellant Edward Seltzer has appealed to this court from a Judgment and Sentence entered in the United States District Court for the Northern District of Ohio, Eastern Division, on the verdict of a jury finding him guilty of perjuring himself before the grand jury in violation of Title 18, Section 1623, United States Code, as charged in Counts III, IV, V, and VI of the superseding indictment.

I.

A.

In May of 1981 the grand jury in the United States District Court for the Northern District of Ohio, Eastern Division, was investigating possible crimes committed against the united States by one Reuben

Sturman including crimes related to the Federal Income Tax Law. Appellant Seltzer had previously been an employee of Sturman. Seltzer was called before the grand jury as a witness on May 21, 1981.

Seltzer was informed of his rights and upon being questioned refused to answer on the grounds that his answers might tend to incriminate him. The Special U.S. Attorney questioning appellant then asked the Grand Jury Foreman to read an Order, signed by U.S. District Judge John Manos, compelling appellant, pursuant to 18 U.S.C. 1/21/2 6002 *et seq.*, to "give testimony and provide other information which [appellant] refuses to give or provide on the basis of his privilege against self incrimination as to all matters about which [appellant] may be interrogated before said Grand Jury." Joint Appendix ("Jt. App.") at 56.[1]

Appellant discussed the matter with his attorney and upon returning to the grand jury stated that he understood that pursuant to the order he had been granted use immunity and that nothing he said before the grand jury could be used against him. The Special U.S. Attorney replied that appellant was correct, but that if he failed to testify truthfully before the grand jury he could be prosecuted for perjury. Seltzer answered that he understood and that he had every intention of testifying truthfully.

Whereupon, the questioning continued, and Seltzer testified, *inter alia*, that he had never used any names other than Edward Seltzer either personally or in business; that he did not know a Sheldon Silverstone, International Bancorpest, or Merchants and Shipowners Bank; and, that, other than certain conversations he had with Sturman's attorney, he had nothing to do with certain wire transfers of money from Swiss banks and/or Merchants and Shipowners Bank and International Bancorpest into accounts in the names of International Book Sales and/or World Wide Publications, two Sturman-controlled companies.

---

[1] References are to the Joint Appendix filed by the parties to this appeal.

Subsequent to appellant's 1981 appearance before the grand jury he wrote a letter to its foreman admitting he had not told the truth and thus had perjured himself. Specifically, appellant wrote that he had refused to answer the question whether he believed that Reuben Sturman was the source of money that appellant had received in Switzerland. He wrote that he had speculated that Sturman was the source of the money but never inquired as to who was the actual investor.

On April 7, 1983, appellant was again called before a Federal Grand Jury conducting an investigation into possible Federal Income Tax violations by Reuben Sturman.[2] Seltzer was again informed of his rights including his right to review his prior testimony before the grand jury and either elaborate on, clarify, or change that prior testimony.

Appellant consulted with his attorney. He then responded that he was not sure whether or not he had signed three certain checks purportedly signed by him and alluded to in his prior testimony. Appellant was again informed that the grant of use immunity did not protect him from prosecution for perjury in the grand jury. Appellant then testified, in part, that he had never used any name other than his own name in any business or personal transactions; he had never used the name Morton Weiss; he did not recall signing Morton Weiss' name to a wire transfer order which transferred $115,000 from the United California Bank ("UCB") to the Merchants and Shipowners Bank.

Appellant testified that he did not recall ever seeing the wire transfer order. He testified that he would not say he did not sign it and that it was possible that he did sign it. Seltzer also testified that he did not recall ever being in the UCB in London.

---

[2] The court below implicitly found that appellant had appeared before two separate grand juries on two separate occasions. Although we express our disagreement with this particular finding, (*See In re Di Bella*, 518 F.2d 955 (2nd Cir. 1975)), it is not necessary for us to decide whether appellant appeared before one grand jury or two since the government has not appealed the dismissal of counts one and two. Therefore, we will not address that question.

Appellant was asked to compare the signature on the wire transfer order with handwriting exemplars he had given to the Internal Revenue Service signing the name "Morton Weiss." He concluded that the signature on the wire transfer was his. After admitting he had signed the document appellant still testified that he did not recall being in the UCB in London.

Appellant testified that he had no independent recollection of taking the $115,000 into the UCB in London and that he did not know who had given him the money to transfer to the United States. Seltzer testified that he might have signed Weiss' name on other papers; that it was possible he did this of his own volition; that it was not likely someone else had directed him to do so; that he had never asked Weiss if he could sign Weiss' name; and, that he did not know why he had done so.

Substantially the same course of testimony followed with respect to two more wire transfer orders, one signed with the name "Ralph Stelzer" and transferring $58,000 from the UCB in London to the International Bancorpest account at the UCB of New York; the other transfer in the amount of $25,000 signed by "Ralph Stelzer" and transferring the money from the UCB in London into the International Bancorpest account at the UCB in New York.

Appellant testified that he had no recollection where he got this money. He did not know why the money was sent back to the United States. He also did not recall ever having made any transactions at the UCB in London.

B.

On December 13, 1984, a two count indictment was returned against appellant in the United States District Court for the Northern District of Ohio charging him with one count of perjury in his 1981 grand jury appearance and one count of perjury in his 1983 grand jury appearance. Appellant moved to dismiss the indictment on the grounds, *inter alia*, that the grand jury's use of his immunized 1981 testimony to indict for the alleged 1983 perjury and use of his 1983 immunized testimony to indict for the

alleged 1981 perjury violated the fifth amendment to the Constitution of the United States and the federal immunity statute, 18 U.S.C. §§ 6002 *et seq.*

Subsequently, the grand jury returned a six count superseding indictment which charged appellant with two counts of perjury at the 1981 appearance and four counts at the 1983 appearance. Appellant renewed his Motion to Dismiss. By means of a Memorandum Opinion dated March 26, 1985, District Judge David D. Dowd granted appellant's motion with respect to counts one and two and dismissed those counts. The motion was denied as to counts three through six relating to the 1983 appearance. Judge Dowd also ruled, over appellant's objection, that the prosecution would be permitted to introduce at trial appellant's 1981 immunized testimony, to the extent relevant, for the purpose of proving the 1983 offense.[3]

At appellant's trial before a jury the government read transcripts of appellant's grand jury appearances into the record and attempted to portray appellant's grand jury testimony with respect to International Book Sales (of which appellant was the designated president) as highly incredible. This was particularly the case with respect to testimony that appellant met with Sturman's attorney and was extended a $200,000 line of credit on the spot with no written agreement, no interest charged, and no time specified for repayment. The alleged consideration was a 50% future interest in a business not yet established. Testimony was also read into the record establishing that appellant drew on most of the $200,000 line of credit, never repaid it, and was never asked to repay it. When International Book Sales ("IBS") folded, its remaining inventory was turned over to another company run by appellant's former employer, Reuben Sturman.

Appellant's grand jury testimony indicated that although he was the sole officer of IBS he did not know if stock was ever

---

[3] Judge Dowd's Memorandum Opinion ruling on defendant-appellant's pretrial motions is published at 621 F. Supp. 714 (N.D. Ohio E.D. 1985).

issued. Appellant did not know why other related corporations were formed with his former employer's input, what their names stood for, what his relationship was with them, or why names were changed.

Appellant testified before the grand jury that he discussed business with Sturman and that Sturman offered him a consultant position when IBS folded, but appellant denied ever forming any opinion as to whether Sturman had provided financing for IBS. It is with respect to this testimony that Seltzer later wrote to the grand jury foreman admitting he had not told the truth while testifying before the grand jury.

The government introduced evidence of bank documents which showed large amounts of money derived from Switzerland and England deposited in IBS accounts as capital and loans. These included three wire transfer orders signed by "Morton Weiss" and "Ralph Stelzer" sending $197,000 in American currency from London into Sturman accounts including $27,000 into IBS. Handwriting exemplars obtained from appellant showed conclusively that he had forged those signatures.

The defense attempted to portray appellant as a cooperative grand jury witness who understood his obligation to tell the truth and had no reason to lie. Testimony of an expert witness, Dr. Elizabeth Loftus, a professor of psychology, was offered by the defense to establish that it is not unusual for an individual to forget events, such as highly unique or important events, which would normally be expected to be remembered.

After summation the trial court instructed the jury, *inter alia*, and over defendant's objection, that materiality had been determined by the court as a matter of law and that it was not a matter for the jury's consideration. The court denied appellant's request that the jury be charged that it must find materiality beyond a reasonable doubt in order to convict. The case was submitted to the jury which returned verdicts of guilty on all four counts. Appellant received an aggregate sentence of eighteen (18) months imprisonment. He was released on bail pending appeal pursuant to 18 U.S.C. § 3143(b). This appeal followed.

II.

This case presents four issues for our consideration:

1. Whether the evidence presented below was legally sufficient to convict appellant of falsely testifying in 1983 that he had no present recollection of the 1976 wire transfer orders.

2. Whether the use, both at trial and before the indicting grand jury, of appellant's 1981 immunized testimony to indict and convict for an alleged 1983 perjury violated the fifth amendment to the Constitution of the United States and the immunity statute.

3. Whether the trial court abused its discretion in allowing cross-examination and prosecutorial comment upon appellant's invocation before the grand jury of his fifth amendment privilege.

4. Whether appellant's constitutional right to a trial by jury was violated when the court removed materiality from the jury's determination and instructed the jury that this element had been established as a matter of law.

A.

Seltzer argues that as a matter of law the prosecution failed to meet its burden of proving beyond a reasonable doubt that he in fact remembered the wire transfer orders in 1983. The government contends that (1) undisputed evidence of other direct falsehoods and perjury relating to the wire transfer orders; (2) the unforgettable nature of the events; (3) Seltzer's motive to lie; (4) the incredible nature of his testimony; and (5) Seltzer's evasive and deceptive answers to questions all constitute more than sufficient evidence to establish appellant's guilt beyond a reasonable doubt. The government also asserts that circumstantial evidence is sufficient to establish Seltzer's state of mind, and in fact, direct evidence on this question is impossible to produce.

We have held that on appeal from a criminal conviction we must only determine "whether the relevant evidence viewed in the light most favorable to the government could be accepted by

a reasonably-minded jury as adequate and sufficient to support the conclusion of defendant's guilt beyond a reasonable doubt." *United States v. Meyers*, 646 F.2d 1142, 1143 (6th Cir. 1981) (citations omitted). *See also United States v. Strong*, 702 F.2d 97, 100 (6th Cir. 1983).

This standard of review is the same whether evidence reviewed is direct or circumstantial. *United States v. Meyers, supra* at 1143. We have stated, with respect to evidence of a mental state: "Although *direct evidence on state of mind is impossible to produce*, circumstantial evidence is useful and competent for this purpose." *Pitts v. United States*, 763 F.2d 197, 201 n.6 (6th Cir. 1985) (emphasis added). *See also Fotie v. United States*, 137 F.2d 831, 842 (8th Cir. 1943).

At trial the prosecution introduced evidence showing appellant had lied at least three times in direct relation to the wire transfer orders at issue. Additional direct evidence indicated that appellant lied to the grand jury when he stated he had never formed an opinion as to whether Reuben Sturman had financed IBS and that appellant had subsequently admitted his lie. Other testimony established that the transactions were far from routine and were highly unusual for the banking community, much less the average citizen. Appellant was uncooperative in testifying before the grand jury, contrary to the picture he attempted to paint in the court below and now attempts to portray here.

Although the bulk of the government's case against the appellant consisted of circumstantial evidence, such evidence is "useful and competent for this purpose." *Pitts v. United States, supra*. We believe that taken together and viewed in the light most favorable to the government, the undisputed evidence of other direct falsehoods and perjury, the particular complex and unusual nature of the events appellant claims he does not recall, the incredible nature of his testimony, appellant's evasive and deceptive answers, and his uncooperativeness constitute such relevant evidence as could be accepted by a reasonably-minded jury as adequate and sufficient to support a conclusion of appellant's guilt beyond a reasonable doubt.

B.

Title 18 U.S.C. § 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to –
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

In *United States v. Apfelbaum*, 445 U.S. 115 (1980), the Supreme Court reversed the Third Circuit which had reversed Apfelbaum's conviction. The Court held that proper invocation of the fifth amendment privilege against compulsory self-incrimination allows a witness to remain silent but not swear falsely. The Court held further that neither the immunity statute nor the fifth amendment require admissibility of immunized testimony to be governed by any different rules than other testimony at a trial for making false statements in violation of 18 U.S.C. § 1623(a). *Id.*, at 117.

In *Apfelbaum* the defendant had made only one grand jury appearance. The issue was whether truthful immunized grand jury testimony could be introduced in a subsequent prosecution for perjury before the grand jury. Justice Rehnquist, writing for the Court, first emphasized the language of §6002 which provides "'no testimony or other information compelled under the order... may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*' (Emphasis added.)" *Id.* at 122. Justice Rehnquist concluded that "[t]he statute... makes no distinction between truthful and untruthful statements made during the course of the immunized testimony. Rather it creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements." *Id.*

The Third Circuit had reversed Apfelbaum's conviction on the ground that perjury prosecutions based on immunized testimony are a "narrow exception" to the principle that a witness should be treated as if he had remained silent after invoking the fifth amendment privilege. 584 F.2d 1264, 1269-1270. Justice Rehnquist responded, relevant to the case *sub judice*, that even allowing truthful and untruthful immunized testimony in a subsequent perjury prosecution "the exception surely would still be regarded as 'narrow,' once it is recognized that the testimony remains inadmissible in all prosecutions for offenses committed *prior* to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant." *Id.*, at 128. (Emphasis added.)

Seltzer here appeals from a conviction for perjury committed in 1983. His 1981 grand jury testimony therefore was *not* used in a prosecution for an offense committed *prior to* the 1981 grant of immunity which would have permitted him to invoke his fifth amendment privilege absent the grant.

The Court in *Apfelbaum* reaffirmed the test for application of the fifth amendment privilege as: "'[W]hether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination. *Rogers v. United States*,

340 U.S. 367, 374; *Brown v. Walker*, 161 U.S. 591, 600.' *Marchetti v. United States*, 390 U.S. 39, 53 (1968)." *Apfelbaum*, *supra*, at 128. Justice Rehnquist again cited *Marchetti* for the proposition that " 'prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination.' 390 U.S., at 54." *Apfelbaum, supra, at 129.* Pursuant to this analysis, in 1981, before his first appearance before the grand jury, appellant faced "only speculative and insubstantial risks of incrimination." *Id.* Accordingly, we hold that neither the fifth amendment nor the immunity statute prevent use of appellant's 1981 immunized testimony at his trial for perjury before the grand jury in 1983 because, at the time appellant was granted immunity in 1981, the privilege would not have protected him against false testimony he might later decide to give in either 1981 or 1983.

With respect to appellant's claim that use of his 1981 grand jury testimony before the indicting grand jury violated the fifth amendment and immunity statute, it has been held that the phrase "criminal case" as used in § 6002 includes grand jury proceedings as well as trial. *United States v. Gregory*, 730 F.2d 692 (11th Cir. 1984), *reh'g denied*, 740 F.2d 979 (1984), *cert. denied*, ____ U.S. ____ , 105 S.Ct. 1171 (1985). Accordingly, the foregoing analysis also applies to that part of appellant's argument challenging use of the 1981 testimony before his indicting grand jury, and we find no error in that respect.

C.

During the government's opening statement at trial a side bar conference was held out of hearing of the jury. At that point the subject of appellant's immunization was first raised by Judge Dowd. He stated that the did not expect the government to get into the proposition that Seltzer was immunized. Judge Dowd stated he believed it would be inappropriate for the jury to know Seltzer testified only with a grant of immunity.

Subsequently, the government asked the court to prohibit the defense from inferring in any way during the course of the trial that Seltzer was a willing, cooperative witness. The court

responded that if defense counsel opened that door he would allow the government to go through it.

Seltzer first testified upon direct examination that his understanding of his rights and obligations when he appeared before the grand jury in 1983 was that he had been given immunity by the government. He testified at trial: "[T]hat if I told the truth, there was nothing that could possibly happen to me and that I was to tell the truth, not speculate, just tell what I knew to be the facts, what I knew to be the truth." Jt. App. at 408.

By his testimony appellant attempted to create the impression that he had been cooperative during the grand jury proceedings. Following the direct examination of the defendant the government sought permission, out of hearing of the jury, to mention that Seltzer's testimony was compelled both in 1981 and 1983. Government counsel also stated that by showing his willingness to cooperate, and by mentioning that he had an opportunity to consult with an attorney during the periods when he was questioned, Seltzer had opened the door to this line of questioning by the government. The court ruled it would allow the inquiry.

After Seltzer refused to acknowledge that he had been uncooperative government counsel asked the questions to which Seltzer's appeal is directed. Specifically, Seltzer was asked:

> Q Isn't it a fact that in your 1981 testimony or 1981 appearance that when you appeared you were asked to testify but refused to testify and had to be compelled by court order to testify and that is why you were given immunity?
>
> A I don't know if that's the meaning of it. My attorney told me I had a right to refuse to testify. I did so, and then the Government gave me immunity.
>
> Q Do you recall that that right to testify of your Fifth Amendment privilege that you had involved the right to not testify if you thought that any testimony that you might give would tend to incriminate you?

MR. ARKIN: Objection to the form of the question, your Honor.

THE COURT: Overruled

A Can you repeat the question, please?

Q Did you understand that your Fifth Amendment privilege meant that you could refuse to testify if you thought truthful answers to any questions would tend to incriminate you on criminal activity?

A I believe that's the way it was explained. The exact words, I don't know.

Jt. App. at 419-420.

During closing argument defense counsel stated that appellant "had immunity so that whatever he said could not be used against him." Jt. App. at 470. Then, on rebuttal, to again dispel the image of a cooperative grand jury witness, the government argued that Seltzer had refused to testify before the grand jury and that his testimony had been compelled under an immunity order.

The scope and latitude of cross-examination are matters left to the discretion of the trial judge. *United States v. Garrett*, 542 F.2d 23, 25 (7th Cir. 1976); *United States v. Daniels*, 528 F.2d 705 (6th Cir. 1976).

"Immunity" is merely protection from prosecution granted to a witness who has asserted his or her fifth amendment rights. *See, e.g., Apfelbaum, supra*, at 122-123; *Kastigar v. United States*, 406 U.S. 441 (1972), *reh'g denied*, 408 U.S. 931 (1972).

An accused in a criminal proceeding who takes the stand is subject to the same kind of cross-examination as any other witness. *United States v. Jackson*, 344 F.2d 922 (6th Cir. 1965), *cert. denied*, 382 U.S. 880 (1965). Such an accused waives his privilege against self-incrimination with respect to all matters reasonably related to the subject matter of his direct examination. *Brown v.*

United States, 356 U.S. 148 (1958), *reh'g denied*, 356 U.S. 948 (1958); *Neely v. Israel*, 715 F.2d 1261, 1263 (7th Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984); *United States v. Green*, 757 F.2d 116, 120 (7th Cir. 1985); Fed. R. Evid. Rule 611(b), 28 U.S.C.

Analogous to the defendant's theory at trial in the case *sub judice* the defendant in *United States v. Le Amous*, 754 F.2d 795 (8th Cir. 1985), *cert. denied*, ____ U.S. ____ , 105 S.Ct. 2684 (1985), attempted to paint a picture of himself, on direct examination, as a protector of young girls who encouraged alternatives to prostitution. He had been charged with and convicted of transporting a minor across state lines for the purpose of prostitution in violation of 18 U.S.C. § 2423. The Eighth Circuit affirmed and held, relevant to the case *sub judice*, that by painting a picture of himself, on direct examination, as a protector of young girls who encouraged alternatives to prostitution, the defendant invited cross-examination concerning particular instances of his conduct to the contrary. *Id.*, at 798.

Similarly, in *United States v. Allston*, 613 F.2d 609 (5th Cir. 1980) the defendant, under sentence for the murder of a fellow inmate, filed a motion to vacate his sentence on the ground that the government had improperly cross-examined him regarding his post arrest silence. The defendant attempted to create the impression, on direct examination, that he had cooperated fully in the government's investigation of the crime. The Fifth Circuit affirmed the conviction and held, relevant to the case *sub judice:* "[T]he district court was correct in ruling that the appellant had 'opened the door' to the cross-examination on the issue of his post arrest silence, and his motion was properly denied on this ground." *Id.*, at 611.

In *Allston* the defendant also complained of the government's use of his post arrest silence during closing argument. The Fifth Circuit analyzed the question under the plain error standard since Allston failed to object to the prosecutor's argument at trial. The court affirmed the trial court's conclusion of no plain error partly on the ground that the evidence of silence had already been properly admitted for impeachment purposes. *Id.*, at 611-612.

In *United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), defendants who had been convicted of conspiracy to commit extortion and extortion under color of official right argued that they had been deprived of a fair trial on the basis of prosecutorial misconduct during the government's closing arguments. The Seventh Circuit affirmed the convictions and held, relevant to this assignment of error, that "[i]t is well settled that where defense counsel makes statements in closing arguments that invite the government to respond, the prosecutor may, on rebuttal, enter into areas that would otherwise constitute improper argument." *Id.*, at 1199 (citations omitted).

We believe that appellant's testimony at trial upon direct examination which attempted to paint a picture of him as a willing, cooperative grand jury witness effectively "opened the door" for the government to cross-examine Seltzer concerning the compelled nature of his grand jury testimony. Also, since such testimony had already been properly admitted and since appellant's counsel first referred to the grant of immunity during closing arguments, we believe that there was no error in allowing the government to mention the compelled nature of Seltzer's testimony in an effort to dispel any vision of him as a cooperative witness. We believe the cross-examination and prosecutorial comment upon appellant's invocation before the grand jury of his fifth amendment privilege was not improper given the particular circumstances of his case.

D.

Appellant's final assignment of error may be readily disposed of pursuant to *Meeks v. Illinois Central Gulf R.R.*, 738 F.2d 748 (6th Cir. 1984) wherein Judge Contie wrote, *citing Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev'd on other grounds*. 441 U.S. 780 (1979), "that a panel of this court may not overrule a previous panel's decision. Only on (sic) en banc court may overrule a circuit precedent, absent an intervening Supreme Court decision." *Meeks v. Illinois Central Gulf R.R.*, 738 F.2d at 751. *See also Smith v. United States Postal Service*, 766 F.2d 205, 207 (6th Cir. 1985).

With respect to this final issue there are two existing rulings of this Court which the trial court followed and which hold that "it has long been settled that the question of materiality in a perjury or false statement case is one of law for the courts to decide." *United States v. Giacalone*, 587 F.2d 5, 6 (6th Cir. 1978), *cert. denied*, 442 U.S. 940 (1979). *See also United States v. Richardson*, 596 F.2d 157, 165 (6th Cir. 1979). Contrary to the appellant's assertions there has been no intervening Supreme Court decision on this question. We are bound to follow *Richardson* and *Giacalone*.

III.

In conclusion, we believe: (1) the evidence presented in the trial court was legally sufficient to convict appellant of falsely testifying in 1983 that he had no present recollection of the 1976 wire transfer orders; (2) the use, both at trial and before the indicting grand jury, of appellant's 1981 immunized testimony to indict and convict for an alleged 1983 perjury did not violate the fifth amendment or the immunity statute; (3) the trial court did not abuse its discretion in allowing cross-examination and prosecutorial comment upon appellant's invocation before the grand jury of his fifth amendment privilege; and, (4) appellant's constitutional right to a trial by jury was not violated when the court removed materiality from the jury's determination and instructed the jury that this element had been established as a matter of law.

For the reasons set forth above the judgment of this district court is AFFIRMED in all respects.

UNITED STATES of America, Plaintiff,

v.

Edward SELTZER, Defendant.

No. CR84-238.

United States District Court, N.D. Ohio, E.D.

March 26, 1985.

MEMORANDUM OPINION

DOWD, District Judge.

This case involves the prosecution of the defendant, Edward Seltzer, for allegedly perjuring himself in two separate proceedings before the grand jury on May 21, 1981 and on April 2, 1983. Defendant was given two separate grants of immunity in exchange for his testimony. On December 13, 1984, a two count indictment was returned by the grand jury against the defendant. He was charged with one count of perjury before the grand jury at the 1981 proceeding and one count of perjury before the grand jury at the 1983 proceeding. On February 6, 1985, a superseding indictment was returned by the grand jury, charging the defendant with six counts of perjury. The first two counts charged the defendant with perjury before the grand jury at the 1981 proceeding. Counts three through six charged the defendant with perjury before the grand jury at the 1983 proceeding.

A review of the transcripts of the 1981 and 1983 grand jury proceedings[1] reveals that the grand juries were investigating the defendant's operation of and involvement with a number of businesses in sales and/or merchandising. The six counts of the superseding indictment are all related by the defendant's role in those operations. Specifically, count one of the superseding indictment involves allegedly false testimony by the defendant in the 1981 grand jury proceeding that he had not used any name besides his given name personally or in business. Count two of

[1] Both are substantial. The transcript of the 1981 proceeding is 187 pages long; the transcript of the 1983 proceeding is 81 pages long.

the superseding indictment involves the defendant's allegedly false testimony in the same proceeding that he did not know Sheldon Silverstone, International Bancorpest, or the Merchants and Shipowners Bank. Counts three to six of the superseding indictment all involve the defendant's allegedly false testimony at the 1983 grand jury proceeding that he did not recall certain transactions involving the wire transfers of monies.

Before the Court are the defendant's "second set of pretrial motions" in which the defendant moves the Court to dismiss, on various grounds, the six counts of the superseding indictment for perjury. Defendant further moves the Court to preclude the prosecution from introducing evidence of defendant's employment in the "adult entertainment business" at trial, and to order that defendant's testimony before the grand jury on two separate occasions "be redacted to eliminate prejudicial and irrelevant references . . ." For the reasons which follow, defendant's motions to dismiss counts one and two of the superseding indictment are granted. Defendant's motions to dismiss counts three through six of the superseding indictment are denied. Defendant's motion to preclude the prosecution from introducing evidence of defendant's employment in the "adult entertainment business" is denied. As to defendant's request for an order requiring the redaction of transcripts, the parties are instructed to comply with the instructions of the Court set out below.

COUNTS ONE AND TWO

The first two counts of the superseding indictment charge that the defendant perjured himself at his appearance before the grand jury on May 21, 1981. Defendant does not contest that the "immunity statute," 18 U.S.C. § 6002, sets forth an exception permitting the use of "immunized" testimony in a prosecution for perjury as follows:

> [N]o testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against a witness in any

> criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

However, defendant argues that the exception only permits the prosecution to use immune testimony for the purpose of prosecuting perjury committed during the course of the immunized testimony, and not for the purpose of prosecuting perjury allegedly committed during the course of earlier or later immunized testimony.

Defendant's argument as to the prohibition of the use of immunized testimony to prove perjury allegedly committed during the course of separate and *earlier* immunized testimony is well taken. In *U.S. v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980), the United States Supreme Court addressed the use of immune testimony to establish prior perjury as follows:

> For even if both truthful and untruthful testimony from the immunized proceeding are admissible in a subsequent perjury prosecution, the exception [that a prosecution for perjury may be based on immunized testimony, contra to the principle that a witness who has been granted immunity for his testimony should be treated as if he has invoked the fifth amendment and remains silent] surely would still be properly regarded as "narrow," once it is recognized that the testimony *remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant*. (emphasis added).

Id. at 128, 100 S.Ct. at 955. Immunized testimony from one proceeding may thus not be used to prove perjury on the part of a witness at an earlier proceeding.

Pursuant to its order of March 15, 1985, the Court has reviewed *in camera* the transcript of the grand jury proceeding which resulted in the superseding indictment. The Court's review of that transcript has led it to the following conclusions. First,

portions of the defendant's immunized testimony from both the 1981 and 1983 proceedings were introduced for the purpose of establishing the alleged perjury. No limiting instructions were given to the grand jury as to the use of defendant's immunized testimony in one proceeding to establish that he perjured himself in the other. Second, the selected portions of the 1983 transcript presented to the indicting grand jury focus, in part, on the defendant's admissions that he had signed, and his implicit admissions that he had, therefore, used, the names of Morton Weiss and Ralph Stelzer in requesting the wire transfers of monies in 1976. Defendant thus conceded, contrary to his 1981 grand jury testimony, that he had used names other than his own. Likewise, selected portions of the 1983 transcript presented to the indicting grand jury focus, in part, on the defendant's admissions that his signature appeared on wire transfers of monies to the International Bancorpest and the Merchants and Shipowners Bank accounts at the United California Bank of New York, and his implicit admissions that such monies were transferred to those institutions at his request. Such admissions establish, contrary to the defendant's 1981 grand jury testimony, that defendant did "know" those institutions. Consequently, the Court finds that the grand jury relied upon and in fact "used" the defendant's 1983 immunized grand jury testimony in order to find a basis for prosecuting the defendant for the 1981 alleged perjury. The Court holds that this use of the 1983 immunized testimony exceeded the scope of the use permitted under *Apfelbaum*, and was improper.[2] Defendant's motions to dismiss counts one and two of the indictment, such counts being based on the use of immunized testimony to establish a prior perjury, are granted.[3]

---

[2] The court finds that the facts in the instant case provide an even stronger case for disallowing the use of defendant's immunized testimony to prosecute for perjury allegedly committed prior to the grant of immunity than in a prosecution for an offense committed prior to the grant of immunity as to which a witness could have but did not invoke his fifth amendment privilege against self-incrimination. In this case, the charged perjury allegedly occurred during the course of defendant's earlier and separate testimony which was also immunized.

[3] Having so found, the Court need not address defendant's remaining challenges to counts one and two of the superseding indictment.

COUNTS THREE THROUGH SIX

The Court finds that immunized testimony may be used to prove perjury allegedly committed during the course of separate and *subsequent* immunized testimony. While the *Apfelbaum* case does not expressly address that situation, the Court in *Apfelbaum* noted *U.S. v. Freed, 401* U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), for its rejection of "the argument that a registration requirement of the National Firearms Act violated the Fifth Amendment because the information disclosed could be used in connection with offenses that the transferee of the firearm might commit in the future." *Apfelbaum, supra,* 445 U.S. at 129, 100 S.Ct. at 956. The Court in *Apfelbaum,* citing two statements from *Freed* that the self-incrimination clause of the fifth amendment does not provide immunity for future crimes,* stated "that the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because at the time he was granted immunity, the privilege would not have protected him against false testimony that he might later decide to give." *Apfelbaum, supra,* at 130, 100 S.Ct. at 957.

---

* The Court first cited the following statements from Justice Douglas' majority opinion, *see Freed, supra,* 401 U.S. at 606-607, 91 S.Ct. at 17,

> Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

and then cited the following statement of Justice Brennan in his concurring opinion:

> I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm.

Freed, supra, at 611, 91 S.Ct. at 1119.

Court gives some indication that such use of immunized testimony is not prohibited, as well as the fact that there is a dearth of case law on the question and defendant has not cited case law establishing otherwise, the Court finds that the use of the defendant's immunized testimony in the first (1981) grand jury proceeding to establish that he allegedly perjured himself in the second (1983) grand jury proceeding, was lawful. Defendant's challenges to counts three to six on those grounds are thus overruled.[5] Further, defendant's immunized testimony from the 1981 grand jury proceeding may be used at trial to establish his alleged perjury at the 1983 grand jury proceeding, to the extent relevant and subject to the Federal Rules of Evidence.

LIMITATION OF EVIDENCE

Defendant requests a prohibition of evidence as to his employment in the "adult entertainment business". Defendant argues that "the unfair prejudice of such proof would greatly outweigh its value." The Court has reviewed defendant's request and finds it to be without merit. The Court will entertain any challenges to specific submissions of such evidence at trial.

REDACTION OF TRANSCRIPTS

The plaintiff government is directed to submit to the defendant Edward Seltzer, on or before Thursday, March 21, 1985, by 4:00 p.m., a notice of what portions of the transcript of the 1981

---

[5] Defendant also challenges counts three and four as duplicitous. The court reserves ruling on that challenge at this time.

and 1983 grand jury proceeding, as relevant,[6] it intends to introduce at trial to prove the alleged 1983 perjury. Defendant is directed to respond to the plaintiff's notice on or before Tuesday, March 26, 1985 by 4:00 p.m., as to what portions of the transcripts of the 1981 and 1983 proceedings he objects to being used at trial, and as to what portions of the transcripts he does not object to being used at trial, reserving to defendant his right to object to the introduction of the entirety of the transcript of the 1981 and 1983 grand jury proceedings to establish perjury by the defendant in the 1983 grand jury proceeding. Both parties are directed to inform the Court, on or before Tuesday, March 28, 1985, by 4:00 p.m., as to the sections of the 1981 and 1983 transcripts the parties dispute should be admissible at trial.

CONCLUSION

Defendant's motions to dismiss counts one and two of the superseding indictment are granted. Defendant's motions to dismiss counts three through six of the superseding indictment are denied. Defendant's motion for a prohibition against the introduction of evidence of defendant's employment in the "adult entertainment business" is denied. As to defendant's request for a redaction of transcripts of the 1981 and 1983 grand jury proceedings, the parties are instructed to comply with the schedule set out by the Court herein.

IT IS SO ORDERED

---

[6] The Court emphasizes its use of the word relevant, noting that in *Apfelbaum*, Justice Rehnquist addressed the exception to the immunity statute, that immune testimony may be used in a prosecution of a witness for perjury, in terms of the admissibility of relevant evidence.

(2)

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-644

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD SELTZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government, in a prosecution for making false declarations under a grant of immunity, may introduce at trial the defendant's immunized testimony at an earlier grand jury proceeding.

2. Whether the trial court, in a prosecution for making false statements in violation of 18 U.S.C. 1623, was required to submit the question of materiality to the jury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-644

EDWARD SELTZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 794 F.2d 1114. The opinion of the district court (Pet. App. A17-A23) is reported at 621 F. Supp. 714.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1986. A petition for rehearing was denied on August 22, 1986. The petition for a writ of certiorari was filed on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted on six counts of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. The first two counts were based on statements made during petitioner's grand jury appearance on May 21,

1981; the other four counts were based on statements made during petitioner's grand jury appearance on April 7, 1983. Prior to trial, the district court dismissed the first two counts, ruling that a grant of immunity to petitioner at the time of his 1983 grand jury appearance precluded the use of that grand jury testimony to indict him for perjury during his 1981 grand jury appearance (Pet. App. A18-A20). With respect to Counts three through six, however, the district court ruled that his 1981 grand jury testimony (also given under a grant of immunity) was properly used to indict petitioner for making false declarations during his 1983 grand jury appearance and that the 1981 testimony was also admissible at the false declarations trial itself (*id.* at A21-A22). Petitioner was subsequently convicted, after a jury trial, on Counts three through six. He was sentenced to an aggregate term of 18 months' imprisonment. The court of appeals affirmed (*id.* at Al-A16).

2.a. The evidence at trial revealed that on May 21, 1981, petitioner was called to testify before a federal grand jury that was investigating an alleged scheme of tax evasion and international money laundering by petitioner's former employer, Reuben Sturman. Relying on his Fifth Amendment privilege, petitioner refused to testify. After being granted immunity under 18 U.S.C. 6002, petitioner testified, inter alia, that he had never used any name other than his own in business or personal transactions and that he was unfamiliar with International Bancorpest or Merchants and Shipowners Bank. He also testified that, apart from certain conversations he had had with Sturman's lawyer, he had no part in certain wire transfers of funds from Swiss banks and/or International Bancorpest or Merchants and Shipowners Bank into accounts of two Sturman-controlled companies. Following his grand jury appearance, petitioner wrote a letter to the grand jury foreman admitting that certain portions of his grand jury testimony had not been truthful. Pet. App. A2-A3.

b. On April 7, 1983, petitioner was again called to testify before a grand jury investigating Sturman's illegal activities. When petitioner invoked his Fifth Amendment privilege and refused to testify, he was again granted immunity under 18 U.S.C. 6002. After being given an opportunity to review and clarify his prior testimony, petitioner again testified that he had never used any name other than his own for either business or personal transactions. He further testified that he did not recall signing three wire transfer orders, in names other than his own, resulting in the transfer of $197,000 from a London bank to various Sturman-related accounts. When confronted with copies of the documents containing entries in his handwriting, however, petitioner admitted initiating the transfers and signing the names appearing on the orders. Nevertheless, petitioner denied having any recollection of the source of the funds, the reasons for the transfers, or any of the events surrounding the transactions. Pet. App. A3-A4, A17.

3. In proving the four false declaration charges relating to petitioner's 1983 grand jury appearance, the government introduced evidence showing petitioner's awareness of Sturman's tax evasion and money laundering scheme. Among the items of evidence introduced by the government was petitioner's immunized 1981 testimony. That testimony was offered to demonstrate that petitioner was testifying falsely in 1983 when he said he had little or no knowledge about the wire transfers. Pet. App. A5-A6.

4. The court of appeals affirmed (Pet. App. A1-A16). Relying on this Court's decision in *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), the court held that neither the Fifth Amendment nor the immunity statute precluded the use of petitioner's immunized 1981 grand jury testimony in the prosecution for false statements made during petitioner's 1983 grand jury appearance (Pet. App. A9-A11). The court also rejected petitioner's claim that the district court

erred in refusing to submit to the jury the issue of the materiality of the false statements (*id.* at A15 -A16).

ARGUMENT

1. Petitioner's principal contention (Pet. 5-8) is that the decision of the court of appeals allowing the use of his immunized 1981 grand jury testimony conflicts with decisions of this Court and the Second Circuit. That claim is without merit.

a. It is well settled that a witness may be prosecuted for perjury or making false declarations in the course of his immunized testimony. In *United States* v. *Apfelbaum, supra*, this Court emphasized that the immunity statute "creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements." 445 U.S. at 122. The *Apfelbaum* Court held that the admission at trial of truthful, as well as false, immunized testimony in a prosecution for perjury committed during the course of the immunized testimony does not violate either the Fifth Amendment or the immunity statute. In so holding, the Court concluded that the Fifth Amendment privilege did not preclude the use of the immunized testimony during the subsequent perjury trial "because, at the time [the defendant] was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give" (*id.* at 130). Because the protection afforded by the immunity statute is only as broad as the Fifth Amendment privilege it displaces, the witness obtains no immunity with regard to an offense that the witness has not yet committed. As the Court noted (445 U.S. at 131), "a future intention to commit perjury or to make false statements * * * is not by itself sufficient to create a 'substantial and "real" ' hazard that permits invocation of the Fifth Amendment."

Relying on the reasoning of *Apfelbaum*, the court of appeals correctly ruled (Pet. App. A9-A11) that petitioner's immunized 1981 grand jury testimony was properly admitted in the prosecution for false declarations made during the 1983 grand jury appearance. Because petitioner could not have invoked the privilege in 1981 with respect to perjury to be committed in 1983, the immunity granted him in 1981 did not protect him against the use of his immunized testimony to prove that he later made false statements during his 1983 grand jury appearance.[1]

Contrary to petitioner's contention (Pet. 6-8), the decision of the court of appeals does not conflict with this Court's decisions in *New Jersey* v. *Portash*, 440 U.S. 450 (1979); *Marchetti* v. *United States*, 390 U.S. 39 (1968); and *Cameron* v. *United States*, 231 U.S. 710 (1914).

Petitioner relies on a statement in *Portash* that testimony compelled under a grant of immunity "may not be put to any testimonial use whatever against [the witness] in a criminal trial" (440 U.S. at 459). The *Apfelbaum* Court recognized, however, that that language could not be

---

[1]Petitioner's argument (Pet. 10), based on the concurring opinions in *Apfelbaum*, that the decision is limited to prosecutions for false statements made during the immunized testimony itself is not persuasive. Although three Justices noted that the facts did not raise an issue concerning the permissible use of immunized testimony at a prosecution for subsequent perjury (445 U.S. at 132-135), six Justices joined in the majority opinion, and the reasoning of that opinion is fully applicable in the present case.

Moreover, the court of appeals in the present case noted its disagreement with the district court's finding that petitioner appeared before two separate grand juries on two separate occasions, although it did not resolve the issue (Pet. App. A3 n.2). To the extent that petitioner's appearances constituted a single appearance before the grand jury (since both occasions related to an investigation of Sturman's illegal activities), the point made in the concurring opinions would be inapplicable.

applied broadly or it could preclude the use of immunized testimony in perjury prosecutions (445 U.S. at 120 n.6). The *Apfelbaum* case makes clear that the statement in *Portash* was not meant to foreclose any criminal use of immunized testimony, regardless of the context. Moreover, as petitioner concedes (Pet. 7 n.3), the Court in *Portash* specifically declined to address whether immunized testimony could be used in a subsequent false declarations prosecution (440 U.S. at 459 n.9). Rather, the *Portash* Court simply held that the prosecution could not use immunized testimony to impeach the defendant at his trial for the substantive offenses about which he had testified before the grand jury. *Portash* is therefore not instructive on the issue presented here.

The decision in *Apfelbaum* likewise undermines petitioner's reliance on *Marchetti* v. *United States*, 390 U.S. 39 (1968). See 445 U.S. at 128-129. In *Marchetti*, the Court declined to apply a rigid distinction between past and future offenses in determining whether the Fifth Amendment privilege was available. It held that a professional gambler engaged in ongoing illegal conduct faced a sufficient risk of incrimination with respect to future acts to justify upholding the claim of privilege. The Court noted (390 U.S. at 54), however, that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." See also *United States* v. *Freed*, 401 U.S. 601, 611 (1971)(Brennan, J., concurring)(noting that the Fifth Amendment does not require the granting of immunity "in connection with crimes that the transferee [of firearms] might possibly commit in the future with the registered firearm"). In any event, in light of *Apfelbaum* it is clear that the risk of incrimination with respect to future acts of perjury does not fall within the holding of *Marchetti*.

Finally, petitioner's reliance on *Cameron* v. *United States*, 231 U.S. 710 (1914), is misplaced. In *Cameron*, the defendant was indicted for committing perjury in two related bankruptcy proceedings. At trial, the prosecution sought to use his testimony in one proceeding to prove that his testimony in the other proceeding was false. The Court held that such use of the testimony violated the applicable immunity statute, Rev. Stat. § 860 (1878 ed.). The Court construed that statute to permit the government to use the allegedly false statements in each proceeding to prove perjury in that proceeding, but not to use the statements to prove perjury in the other proceeding. *Cameron*, however, did not appear to turn on an interpretation of the Fifth Amendment (see 231 U.S. at 721, 724). Moreover, it involved a statute very different from the 1970 use immunity statute at issue in this case. The statute at issue in *Cameron*, after specifying that immunized testimony could not be used in any criminal proceeding, provided that the protection did not apply to the use of the testimony in a prosecution for " 'perjury committed in * * * testifying as aforesaid' " (231 U.S. at 720 (quoting Section 860)). Thus, by its terms, Section 860 authorized the use of the testimony only in a case charging that the testimony itself was perjured; it did not authorize the use of that evidence to prove that testimony given at *another* time was false. The statute at issue here, by contrast, is not explicitly limited to perjury committed during the course of the immunized testimony. Instead, it is phrased more expansively to permit use of immunized testimony in "a prosecution for perjury [or] giving a false statement" (18 U.S.C. 6002).

Petitioner also contends (Pet. 6) that the decision of the court of appeals conflicts with a series of pre-*Apfelbaum* decisions in the Second Circuit: *United States* v. *Berardelli*, 565 F.2d 24 (1977); *United States* v. *Moss*, 562 F.2d 155 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); and

United States v. *Housand*, 550 F.2d 818, cert. denied, 431 U.S. 970 (1977). Those three cases, however, were effectively overruled by *Apfelbaum*, in which the Court specifically noted (445 U.S. at 119 n.5) that, in the Second Circuit, false immunized testimony had been held admissible in a subsequent perjury prosecution, although truthful immunized testimony had not. Because the *Apfelbaum* Court concluded that truthful as well as false immunized testimony is admissible in a prosecution for a subsequent act of false swearing, the Second Circuit cases cited by petitioner are no longer good law.[2]

2. Petitioner also contends (Pet. 11-13) that the district court erred in refusing to submit to the jury the issue of the materiality of his false statements. Petitioner concedes (*id.* at 11-12) that this Court, in *Sinclair* v. *United States*, 279

---

[2]Petitioner's contention (Pet. 8-10) that the court of appeals applied the wrong test for determining the application of the Fifth Amendment privilege likewise lacks merit. The *Apfelbaum* Court explicitly reaffirmed that the test for applying the Fifth Amendment privilege is " 'whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination' " (445 U.S. at 128 (citations omitted)). Applying that test, the court of appeals correctly concluded (Pet. App. A10-A11) that, at his first grand jury appearance in 1981, petitioner faced only speculative and insubstantial risks of self-incrimination from future false testimony; the 1981 immunity grant was therefore not required to protect against the use of petitioner's compelled 1981 testimony in a prosecution for giving false statements in a later proceeding.

In this regard, petitioner's reliance (Pet. 9) on *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), is misplaced. The Court in *Hoffman* explained that the scope of the privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime" (*ibid.*). As the Court observed, however, this protection is confined to those instances when the witness "has reasonable cause to apprehend danger from a direct answer" (*ibid.* (citation omitted)).

U.S. 263, 298 (1929), stated that the materiality of perjured testimony is a question of law for the court, but he contends that *Sinclair* is no longer good law. We submit, however, that *Sinclair* remains good law and that the courts below properly followed it.

Sinclair involved a challenge to a conviction under 2 U.S.C. 192, which imposes a penalty on any witness before a committee of Congress who refuses to answer "any question pertinent to the question under inquiry" by the committee. The Court rejected Sinclair's claim that the question he declined to answer was not pertinent to any inquiry the committee was authorized to make (279 U.S. at 296-298). It held (*id.* at 298) that the question of pertinency had been "rightly decided by the court as one of law." The Court noted (*ibid.* (citations omitted)) that the issue was similar to that of the materiality of false testimony in a perjury prosecution, in which "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court."

This Court has not retreated from its statements in *Sinclair*. Thus, in *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962), the Court reiterated its holding in *Sinclair* that pertinency under 2 U.S.C. 192 is a question to be determined by the court as a matter of law. The rule announced in *Sinclair* is well settled and continues to be followed in all the federal courts of appeals and in most state courts. See, *e.g.*, *United States* v. *Bridges*, 717 F.2d 1444, 1448 & n.18 (D.C. Cir. 1983) (citing cases), cert. denied, 465 U.S. 1036 (1984); *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980)(involving case brought under 18 U.S.C. 1623); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979)(same). Petitioner cites nothing in the legislative history of 18 U.S.C. 1623 to suggest that

Congress intended to abandon the traditional rule in prosecutions brought under that statute. See generally *United States* v. *Watson*, 623 F.2d at 1201 n.6.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

DECEMBER 1986

---

[3]Petitioner suggests (Pet. 11-12) that *In re Winship*, 397 U.S. 358 (1970), and its progeny have effectively overruled *Sinclair*. In *Winship*, the Court indicated that the prosecution is required to prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged (*id.* at 364). As the language of *Winship* suggests, however, the "beyond a reasonable doubt" standard applies to questions of *fact*; it has no application with respect to questions of law.

Petitioner also asserts (Pet. 12) that the Court should resolve a conflict between state and federal courts concerning whether materiality is a matter of law. He relies on *Commonwealth* v. *McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979), in which the Supreme Judicial Court of Massachusetts held that the element of materiality under a state perjury statute was a matter for the jury rather than for the court. *McDuffee* clearly represents the minority point of view. See *State* v. *Sands*, 123 N.H. 570, 592, 467 A.2d 202, 215-216 (1983) (noting that all federal courts follow the traditional rule and that Georgia, New York, and Massachusetts are apparently the only states to hold that materiality in a perjury case is a jury question). The *McDuffee* case, however, is not in conflict with the decision in this case, because *McDuffee* addressed the issue of materiality under a state statute, not under 18 U.S.C. 1623.